

1. **Fiu Uolilo (Migration) [2017] AATA 1925 (12 October 2017)**

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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Valufitu Fiu Uolilo

CASE NUMBER: 1617367

DIBP REFERENCE(S): CLF2013/235938 OSF2013/094814

MEMBER: Moira Brophy

DATE: 12 October 2017

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Migrant) (Class BC) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 100 (Spouse) visa:

- Public Interest Criterion 4020 for the purposes of cl.100.222 of Schedule 2 to the Regulations.

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12 October 2017 at 12:05pm

Statement made on

CATCHWORDS

Migration – Partner (Migrant) (Class BU) visa – Subclass 100 (Spouse) – Emotional and economic hardship – False or misleading information – Bogus document – Compelling and compassionate circumstances

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, Schedule 2 cl 100.222 PIC 4020, cl 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

The Tribunal directs that information that would identify the applicant (including information about family, friends or associates) not be published (under s.378 of the *Migration Act 1958*). This means that if this decision is published, names and other identifying material must be removed from or modified in the published version of the decision.

STATEMENT OF DECISION AND REASONS

ISSUE

5. The issue in the present case is whether the applicant, Mr Valufitu Fiu Uoililo meets Public Interest Criterion 4020 (PIC 4020) as required by cl.100.222 of Schedule 2 to the Migration Regulations 1994 (the Regulations) for the grant of the visa.

APPLICATION FOR REVIEW

6. This is an application for review of a decision made by a delegate of the Minister for Immigration on 4 October 2016 to refuse to grant the applicant a Partner (Migrant) (Class BC) visa under s.65 of the *Migration Act 1958* (the Act).
7. The applicant applied for the visa on 26 August 2013. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.100.222 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because he provided evidence to the department on 27 May 2014 that was considered to be of a 'non-genuine' nature.
8. The applicant appeared before the Tribunal on 26 September 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor Ms Faatoina Titi Faletagaloa and from her daughter Ms Dominica Ruta Faletagaloa. The Tribunal hearing was conducted with the assistance of an interpreter in the Samoan and English languages.
9. The applicant was represented in relation to the review by his registered migration agent who provided a written submission but did not attend the hearing.
10. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

BACKGROUND

11. Mr Uoililo is a 40-year-old citizen of Samoa. He has declared no previous relationships. His father is deceased and his mother, three brothers and three sisters reside in Samoa.
12. Ms Faletagaloa is a 39-year-old who was born in Samoa. She was granted Australian citizenship on 18 August 2003. She was previously in a defacto relationship with Tuipulotu Siosaia in the period from October 1999 to February 2005. There were two daughters of the relationship born 21 January 2000 and 22 May 2003. Her parents and three sisters are all resident in Australia.
13. The parties stated that they met on 3 November 2011 and committed to a relationship to the exclusion of all others on 13 July 2011. They were married on 27 January 2012 in Samoa.
14. On 25 August 2016 the Department wrote to Mr Uoililo to invite him to comment on adverse information and to provide submissions about compelling and compassionate circumstances.
15. On 19 September 2016 Mr Uoililo's migration agent submitted information to the Department and disputed that Mr Uoililo had deliberately provided false or misleading information. It was submitted the relevant documents had been provided by the Samoan Police not by the applicant. In the event of a positive finding against the applicant it was contended there were compelling and compassionate circumstances in that there were three children of the

applicant and sponsor and it would not be in their best interests if Mr Uolilo was forced to leave Australia.

16. In the Decision Record the delegate stated the provision of the bogus document was the responsibility of the applicant and it was his responsibility to ensure the information it contained was correct. In this case the bogus document was paramount in obtaining a positive outcome for the applicant. He considered the issue of compelling circumstances and found that while there were Australian citizen children in this instance that should not be given greater weight than the issue of the applicant returning to Samoa to serve out the rest of his prison sentence. The delegate was not satisfied that the applicant met the waiver requirements of PIC 4020(4).
17. Prior to the hearing Mr Uolilo's migration agent provided a submission.

CONSIDERATION OF CLAIMS AND EVIDENCE

18. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.100.222 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).
19. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

20. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no

requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

21. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
22. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
23. There is information before the Tribunal that Mr Uolili has given information to the Minister that is false or misleading in a material particular in relation to his Subclass 100 visa application lodged on 26 August 2013. It is submitted that Mr Uolili presented himself at a police station and requested a police certificate. He claims he made no misrepresentation and paid no bribe. The applicant submits he had no involvement in the provision of the certificate other than making the original request and therefore it cannot be held he caused incorrect information to be given. It was accepted the information contained in the certificate was not correct in that it did not refer to the two convictions of the applicant. The Tribunal does not accept the submission that Mr Uolili did not cause the false information to be given. At the time of hearing Mr Uolili told the Tribunal he knew the criminal charges would impact on his partner application and that he was concerned about what would be contained in the Police Clearance Certificate. He said he had been surprised when his visa was granted. The Tribunal did not regard it as plausible that a person convicted of a criminal offence and serving a goal sentence for that offence at the time the police certificate was requested would have been given a clean certificate without there being some human interference.
24. The Tribunal has considered the submissions provided by Mr Uolili's migration agent to the Department but is satisfied that the information was false or misleading at the time it was given and was relevant to the criteria the Minister considered when making a decision on the application.
25. Therefore, Mr Uolili does not meet cl.4040(1).

SHOULD THE REQUIREMENTS OF CL.4020(1) OR (2) BE WAIVED?

26. The requirements of cl.4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa.
27. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
28. The Explanatory Statement states that it is intended that the granting of the waiver relates solely to compelling circumstances affecting Australia's interests, or the compassionate or compelling circumstances affecting the interests of an Australian citizen, an Australian

permanent resident or an eligible New Zealand citizen, not the interests of the visa applicant. The types of circumstances that may involve compelling or compassionate reasons for waiving the requirements of PIC 4020 include:

- family reasons (for example, unexpected serious or fatal family situations over which the applicant had no control, such as the incapacitation or death of a partner or child or another member of the family unit);
- that family members in Australia would be left without financial or emotional support; and
- a parent in Australia would be separated from their child (for example, if the child was removed with their non-resident parent and would therefore be subject to an exclusion period).

29. The Tribunal is required to consider all the circumstances of the case including any matters put forward by Mr Uolili, and determine on the evidence as a whole whether there are compelling and/or compassionate circumstances justifying the granting of the visa.

30. Australia is a signatory to the UN Convention on the Rights of the Child 1989 (CROC) and the International Convention on Civil and Political Rights 1996 (ICCPR), both of which protect the rights of children and families.

31. *Articles 3 and 9 of CROC state:*

32. *3. In all actions concerning children ... the best interests of the child shall be a primary consideration.*

33. . . .

34. *9. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. . .*

35. *Article 23 of the ICCPR states:*

36. *The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.*

37. In this case the Tribunal accepts the evidence Mr Uolili is the biological father and the sponsor Ms Faletagaloa (an Australian citizen) is the mother of four children who are Australian citizens:

- Gutua Telesia Val-Ina Easter Valufitu DOB 7 April 2012
- Fitu Tuaydon Valufitu DOB 3 April 2013.
- Stanfield Lauina Valufitu DOB 28 July 2015
- Benjamin Manaia Elias Valufitu DOB 25 July 2017.

38. There are two other children of the family unit who are the step daughters of the applicant and the biological children of the sponsor. These two children are Australian citizens.

- Dominica Ruta Faletagaloa DOB 21 January 2000

- Ayanna Tapa'au Towina Siosaia DOB 22 May 2003.

39. At the time of hearing Ms Dominica Faletagaloa gave evidence of the part the applicant plays in the life of the children especially her and her sister. She gave evidence of their fears of his having to go back to Samoa. She said she was currently in Year 12 and the fear of separation from her stepfather was impacting on her studies. The Tribunal also had before it a letter from Rev. Ropeti Enoka of the Samoan Methodist Church (Macquarie Fields Parish) attesting to the role the visa applicant played in the lives of all the children in the family.
40. On the evidence before the Tribunal, it is satisfied that the visa applicant and the six children have formed a close and positive bond. In this regard, the Tribunal was not only persuaded by the evidence of the visa applicant and his sponsor, but gives considerable weight to the evidence from Ms Dominica Faletagaloa which was persuasive. The Tribunal finds the departure of the applicant from Australia for what would be a considerable time would be significantly detrimental to the children, and as a consequence of that, it would be detrimental to the sponsor. The Tribunal places significant weight on this factor in this case.
41. The Tribunal finds the hardship experienced would be the emotional difficulty associated with a protracted physical separation if the visa applicant were to return to Samoa and the sponsor were to remain in Australia. If the family were to relocate to Samoa the sponsor would lose the benefit she has in Australia of subsidised housing and Centrelink income support. In Samoa she would face economic hardship, if she were to remain in Australia she would face emotional hardship.
42. The Tribunal has carefully weighed the evidence in this case having regard to the fact that a waiver will mean Mr Uolili does not return to Samoa to serve the remainder of his sentence. Given the gravity of that situation the Tribunal has carefully weighed this against the interests of the family unit.
43. In this case there are a number of Australian citizen children who are affected by the decision specifically the four biological children of the visa applicant and the two stepchildren. The Australian courts have previously held that not only are their interests as children to be assessed as a primary concern, but also their interests as Australian citizens.
44. After taking into account all of the above, the Tribunal finds that there are compassionate or compelling circumstances in this case that affect the interests of Ms Faletagaloa, who is an Australian citizen, as well as her children, who are Australian citizens, that justify the granting of the visa.
45. Therefore the requirements of cl.4020(1) should be waived.

HAS THE APPLICANT SATISFIED THE IDENTITY REQUIREMENTS?

46. Clause 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. The Tribunal is satisfied that Mr Uolili who appeared before it is the same person as appears in his passport information page in the Department's file and on his visa application.
47. Therefore, the applicant meets cl.4020(2A).

HAS A VISA PREVIOUSLY BEEN REFUSED ON THE BASIS OF A FAILURE TO SATISFY CL.4020(2A)?

48. Clause 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is

granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: cl.4020(2BA).

49. There is no evidence before the Tribunal that Mr Uolili has been refused a visa because of a failure to satisfy identity requirements in PIC 4020(2A) in the relevant 10 year period.
50. Therefore the Tribunal is satisfied that Mr Uolili meets PIC 4020(2B).
51. On the basis of the above, Mr Uolili meets PIC 4020 for the purposes of cl.100.222.

DECISION

52. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 100 (Spouse) visa:
 - Public Interest Criterion 4020 for the purposes of cl.100.222 of Schedule 2 to the Regulations.

Moira Brophy
Member

ATTACHMENT

MIGRATION REGULATIONS 1994

SCHEDULE 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

MIGRATION ACT 1958

S.5 INTERPRETATION

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...